

# STATE OF WISCONSIN

## Department of Commerce

*In the matter of the PECFA Appeal of:*

William Jalensky  
AFB Automotive  
3402 60th Street  
Kenosha, WI 53144-4144

PECFA Claim #531444144-02  
Hearing #96-28

### **Final Decision**

#### PRELIMINARY RECITALS

Pursuant to a petition for hearing filed June 12, 1995, under s. 101.02(6)(e), Wis. Stats., and ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was held on August 8, 1996, at Madison, Wisconsin. A proposed decision was issued on September 16, 1996, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the department's May 16, 1995, decision denying reimbursement of costs submitted under the PECFA program in the amount of \$2,360.00 (Gabriel-Midwest, Ltd., invoice #5585) was correct.

There appeared in this matter the following persons:

#### **PARTIES IN INTEREST:**

William Jalensky  
AFB Automotive  
3402 60th Street  
Kenosha, WI 53144-4144

Department of Commerce  
201 East Washington Avenue  
P.O. Box 7946  
Madison, WI 53707-7946  
By: Kristiane Randal  
Assistant General Counsel  
P.O. Box 7946  
Madison, WI 53707-7946

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated August 21, 1996.

The matter now being ready for decision, I hereby issue the following

#### FINAL DECISION

The proposed decision dated September 16, 1996, is hereby adopted as the final decision of the department.

### **NOTICE TO PARTIES**

#### **Request for Rehearing:**

This is a final decision under s. 227.48, Wis. Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, P.O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST".

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

#### **Petition for Judicial Reviews**

Petitions for judicial review must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Commerce, Office of the Secretary, 123 W. Washington Avenue, 9th Floor, P.O. Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the state statutes.

Dated and mailed: 10-23-96

Patrick J. Osborne, Executive Assistant  
Department of Commerce  
P.O. Box 7970  
Madison WI 53707-7970

cc: Parties in Interest and counsel

Mailing Date: October 24, 1996

**STATE OF WISCONSIN**

## **DEPARTMENT OF WORKFORCE DEVELOPMENT**

**IN THE MATTER OF:**

**Request for Reimbursement Pursuant  
to the Provisions of the PECFA Program**

**Hearing Number: 96-28  
PECFA Claim Number: 53144-4144-02**

William Jalensky

Appellant,

vs.

Wisconsin Department of Industry, Labor  
and Human Relations,

Respondent.

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### **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

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On May 16, 1995, the Department of Industry, Labor and Human Relations issued an appealable order denying William Jalensky reimbursement in the amount of \$5,194.92 under the PECFA program. William Jalensky filed a timely appeal from such denial on June 12, 1995, and requested reimbursement of denied costs in the amount of \$2,360. Pursuant to that appeal a hearing was held on August 8, 1996, at Madison, Wisconsin before James H. Moe acting as hearing officer.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

#### **PROPOSED FINDINGS OF FACT**

1. At all times material, William Jalensky (hereinafter appellant) was the legal owner of the premises located at 3402 60th Street, Kenosha, Wisconsin, and operated a business at such location known as AFB Automotive.
2. Sometime during 1991, the appellant retained Gabriel-Midwest, Ltd. (hereinafter agent), to conduct a sampling investigation at the property to verify that the area around previously removed underground petroleum storage tanks was not contaminated.
3. On October 2, 1991, the preliminary on-site results indicated petroleum discharge. Based on the preliminary results, additional borings were drilled and samples collected on October 2, 1991, for further laboratory testing.

4. Laboratory testing of the samples conducted during October of 1991 indicated elevated levels of petroleum compounds.
5. On October 28, 1991, the agent notified the division of emergency government hotline, as required by section 101.143 of the statutes.
6. On October 31, 1991, the agent submitted an invoice of \$2,360 to the appellant for costs incurred related to the samples and laboratory analysis.
6. The appellant filed a claim for reimbursement under the PECFA program for total costs incurred of \$93,328.83. The department's May 16, 1995, decision awarded reimbursement of costs in the amount of \$81,352.21. The department denied reimbursement of the agent costs of \$2,360 because those costs were incurred prior to notification of the appropriate state agency.

### **APPLICABLE STATUTES**

Section 101.143 (3) of the statutes provides, in relevant part, as follows:

(3) CLAIMS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES. (a) who may submit a claim. An owner or operator...may submit a claim to the department for an award under sub. (4) to reimburse the owner or operator for the eligible costs under sub. (4)(b) that the owner or operator...incurs because of a petroleum products discharge from a petroleum product storage system...if all of the following apply.

5. The owner or operator...reports the discharge in a timely manner to the division of emergency government in the department of military affairs or to the department of natural resources, according to the requirements under s. 144.76.

Section 144.76 of the statutes provides, in relevant part, as follows:

(2) NOTICE OF DISCHARGE. (a) A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge not exempted under sub. (9).

### **PROPOSED DISCUSSION**

The appellant contended that the costs of \$2,360 incurred in October of 1991 should be eligible for reimbursement because the department relied on administrative rules not in existence in 1991 to deny reimbursement. This contention cannot be sustained. Reimbursement of those costs is governed by section 101.143(3)(a)5 of the statutes. The statute requires that the owner or operator notify the division of emergency management or the department of natural resources of the discharge in a timely manner. In addition, section 144.76 referenced by the PECFA statute requires immediate notification to the Department of Natural Resources of any discharge. The purpose of such a requirement is to prevent environmental catastrophes.

In this instance, despite the preliminary indications of discharge known to both the appellant and his agent on October 2, 1991, neither he nor his agent provided notification to the appropriate state

agency for an additional 26 days. The appellant's agent, who provided the required notice on October 28, 1991, did not appear at the hearing and no evidence was presented on its behalf to explain why immediate notification to the appropriate agency was not made after it became apparent on October 2, 1991 that there was petroleum product discharge. Under the circumstances, the appellant's agent failed to provide notice in a timely manner to the appropriate state agency within the meaning of the statutes.

### **PROPOSED CONCLUSIONS OF LAW**

1. William Jalensky is an owner/operator within the meaning of section 101.143(3) of the statutes.
2. The soil borings done at 3402 60th Street, Kenosha, Wisconsin constituted petroleum product investigation within the meaning of section 101.143(3) of the statutes.
3. The October 28, 1991, notification to the division of emergency government by the appellant's agent was not in a timely manner within the meaning of section 101.143(3)(a)5 of the statutes.
4. The department's action denying reimbursement in the amount of \$2,360 was reasonable pursuant to section 101.143(3)(a)5 and 144.76 of the statutes.

### **PROPOSED DECISION**

The department's decision dated May 16, 1995, establishing the final reimbursable costs to the applicant, William Jalensky, was reasonable and is affirmed.

**STATE HEARING OFFICER**

James H. Moe